IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2006 Session

STATE OF TENNESSEE v. JODY EVANS

Appeal from the Circuit Court for Jefferson County
No. 7455-7828 O. Duane Slone, Judge

No. E2005-00261-CCA-R3-CD - Filed June 5, 2006

The defendant pled guilty in Jefferson County Circuit Court to aggravated assault, two counts of simple assault, vandalism, simple possession of marijuana and driving on a revoked driver's license, second offense. The trial court sentenced the defendant to nine years on the aggravated assault conviction and eleven months and twenty-nine days on each of the other convictions. These sentences were all ordered to run concurrently. The defendant now appeals the trial court imposition of his sentence for the aggravated assault. He argues that the trial court incorrectly applied two enhancement factors and failed to apply one mitigating factor. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT. JR., JJ., joined.

J. Michael Kerr, Jefferson City, Tennessee, for the appellant, Jody Evans.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and Charles L. Murphy, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The following are the facts as recounted by the assistant district attorney at the defendant's guilty plea:

> [T]he facts in this case would show that on November 21st of 2002 Mr. Evans apparently was a relative of the victim or by marriage would be a relative of the victim, Ricky David Phillips, became involved in an altercation with Mr. Phillips which resulted in Mr. Evans striking Mr. Phillips with a hammer, as alleged by the victim.
>
> This did result in the victim going to the hospital, being treated for I believe a fractured shoulder as well as other marks and injuries.
>
> Also during the altercation, Your Honor, apparently Ms. Debra Phillips got in between them and was struck with the hammer once. No apparent injuries other than a small abrasion on her skin. So that one has been amended to a Reckless Aggravated Assault.
>
> Your Honor, in Case #7828, apparently on March 8th of 2004, officers were called to respond to a Charlene McKinney, who reported to them that Mr. Jody Evans had been at her home and apparently had chased her with apparently a sword and threatened to kill her. No injury was done to Ms. McKinney other than her being in fear of bodily injury.
>
> Also, the defendant apparently had run over a fence belonging to an Alan Foster, and apparently when pulled over by police officer he was driving on a revoked license and had a prior conviction for driving on a revoked license. He also had some Marijuana in his possession.

Based on these alleged facts, on October 18, 2004, the defendant entered an Alford plea at a hearing.[1] The defendant pled guilty to aggravated assault and simple assault from the January indictments and vandalism, simple assault, simple possession and driving on a revoked driver's license, second offense.

On January 24, 2005, the trial court held a sentencing hearing on the defendant's guilty pleas. The trial court sentenced the defendant to nine years for the aggravated assault to be served as a Range II multiple offender. The trial court also sentenced the defendant to eleven months and twenty-nine days on each of the remaining misdemeanor convictions to be served at seventy-five percent. The sentences were all run concurrently pursuant to the defendant's plea agreement. The defendant then filed a timely notice of appeal regarding his sentencing.

[1] This type of plea is named after North Carolina v. Alford, 400 U.S. 25 (1970), in which the United States Supreme Court discussed the right of an accused to plead guilty in his best interest while protesting his actual innocence.

ANALYSIS

The defendant pled guilty to aggravated assault, two counts of simple assault, vandalism, simple possession and driving on a revoked license. His aggravated assault conviction was the only non-misdemeanor conviction. The defendant argues that the trial court erred in enhancing his sentence for a history of violent behavior, by misapplying the previous history of criminal convictions enhancement factor, misapplying that the defendant has displayed an unwillingness to comply with conditions of release in the community and that the trial court did not give proper consideration to the defendant's expression of remorse.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5) & -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

In balancing these concerns, a trial court should start at the presumptive sentence, enhance the sentence within the range for existing enhancement factors, and then reduce the sentence within the range for existing mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. Id.[2]

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety

[2] We note that the Tennessee Supreme Court has determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury or admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with the holdings of Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), or United States v. FanFan, the case consolidated with Booker, because "the Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005). Effective July 1, 2005, the Tennessee General Assembly amended the sentencing act to reflect the advisory nature of enhancement factors.

of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) & -103(5); State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

The trial court made the following findings at the sentencing hearing:

> The Court has considered the principles as set forth in the Criminal Sentencing Reform Act of 1989, and the evidence in the Investigation Report, the evidence from the witnesses in this matter.
>
> The court does find you to be a Range 2 Offender with regard to your felony sentence. The Court does find as [an] enhancement factor that you have a previous history of criminal convictions and criminal behavior in addition to that necessary to establish the appropriate range, and that criminal behavior set forth in your Criminal History demonstrates convictions, and your criminal behavior in addition to that necessary to establish the appropriate range.
>
> The criminal behavior set forth in your Criminal History demonstrates a violent background, a person who is not a respecter [sic] of a person's property or their liberty, their own safety.
>
> The Court puts a great weight on that enhancement factor. Further, the Court finds as an enhancement factor that, now I'm speaking with regard to the Aggravated Assaults, conviction and sentence. That you, under Enhancement Factor #9, that you have a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.
>
> The Court enhances your sentence within the range from six to ten years to the Tennessee Department of Corrections. Now, the Court is reviewing mitigating factors. The Court finds that none of the enumerated mitigating factor to apply [sic]. However, the Court does find that you have taken action to improve your life circumstances as well as that of your family.
>
> However, the Court can put very little weight in that mitigating factor. Even with that being said, the Court will reduce that sentence to nine years, mitigate it down to nine years.

> With regard to the misdemeanor convictions, the Court finds that due to your Criminal History that it's appropriate to sentence you to seventy-five percent of eleven/twenty-nine. As part of your plea agreement those sentences shall run concurrent with each other and concurrent to the nine year sentence.
>
> Mr. Evans, today I cannot in good conscious do anything other than to send you to the penitentiary. He's in your custody.

As evidenced by the trial court's findings at the conclusion of the sentencing hearing, the trial court considered the sentencing principles as stated in Ashby. Therefore, there is a presumption that the trial court's determinations are correct. The defendant first argues that the trial court improperly relied upon the defendant's violent history because a history of violence is not an enhancement factor.

The defendant is correct in his statement that a history of violence in and of itself is not an enumerated enhancement factor. However, we conclude that the trial court specifically did not per se rely on the defendant's violent history as an enhancement factor. The defendant quotes a portion of the following statement by the trial court, "The criminal behavior set forth in your Criminal History demonstrates a violent background, a person who is not a respecter [sic] of a person's property or their liberty, their own safety." The trial court made this statement to explain why enhancement factor two, a previous history of criminal convictions and criminal behavior in addition to that necessary to establish the appropriate range, was worth heavy weight.

After reviewing the defendant's pre-sentence report, there is no question that this enhancement factor applies. The defendant has several misdemeanor convictions including reckless endangerment with a vehicle, larceny from a person, and evading arrest. He also has been charged with burglary and theft as well as a few drug offenses. Clearly, this prior criminal history supports the application of this factor.

The defendant also argues that the trial court incorrectly applied enhancement factor nine, that the defendant has a history of unwillingness to comply with the conditions of a sentence involving release in the community. The presentence report states that the defendant had probation revoked in December of 1997. The application of this enhancement factor is supported by the fact that the defendant has previously had his probation revoked.

The defendant also argues that the trial court did not give proper consideration to the defendant's expression of remorse as a mitigating factor. In State v. Williamson, 919 S.W.2d 9, 83 (Tenn. Crim. App. 1995), we stated that "genuine, sincere remorse" could be applied as a mitigating factor under Tennessee Code Annotated section 40-30-113(13). However, we later stated that "a trial court must determine the credibility of a defendant's claims of remorse before the mitigating factor may be properly applied." State v. Rodney Buford, No. M2004-01568-CCA-R3-CD, 2005 WL 2333616, at *6 (Tenn. Crim. App., at Nashville, Sept. 22, 2005). We also went on to state that

"[t]he trial court, by observing the Appellant's demeanor and assessing credibility, is in a much better position to determine a defendant's remorse than is this court." Id.

The trial court did not rely upon the defendant's statement of remorse as a mitigating factor. "The weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances. . . . In other words, the weight that is given to any existing factors is left to the trial court's discretion so long as . . . its findings are supported by the record." State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). We see no reason to substitute our discretion for that of the trial court with regard to the application of the defendant's remorse as a possible mitigating factor.

The defendant pled guilty to aggravated assault. The trial court determined that he was a Range II offender. The sentence range of aggravated assault as a Range II offender is six to ten years. The trial court enhanced the defendant's sentence based on two enhancement factors to ten years and then reduced it by a mitigating factor for the defendant's actions to improve his life. The record more than supports the fact that the trial court followed the sentencing guidelines as set out by statute. Therefore, there is a presumption that the trial court's determinations are correct. The record also supports the findings of the trial court and the application of both the enhancement and mitigating factors.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

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JERRY L. SMITH, JUDGE